BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRUCE BATSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 170,395
PRECISION INDUSTRIES	)	
Respondent	)	
AND	)	
	)	
NORTHWESTERN NATIONAL INSURANCE CO.	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The respondent and insurance carrier requested review of an Award entered by Administrative Law Judge George R. Robertson dated January 10, 1995. The Appeals Board heard oral argument on September 20, 1995.

APPEARANCES

The claimant appeared by his attorney, David G. Shriver of McPherson, Kansas. The respondent and its insurance carrier appeared by their attorney, Jeffrey E. King of Salina, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Norman R. Kelly of Salina, Kansas.

RECORD AND STIPULATIONS

The Appeals Board reviewed the record and adopted the stipulations listed in the Award. The record also includes a settlement hearing was held on May 26, 1995, before Special Administrative Law Judge Philip Shaffer at which the issues between respondent and claimant were resolved and the Workers Compensation Fund (Fund) concurred in that settlement.

ISSUES

The respondent appealed the decision of the Administrative Law Judge. Several issues were listed in the Application for Review. Subsequently, there was a settlement between respondent and claimant which resolved all issues except the liability of the Fund. Therefore, the sole issue remaining for Appeals Board review is the Fund's liability. The findings and conclusions of the Administrative Law Judge in his January 10, 1995, Award concerning issues not raised by the parties in this appeal are hereby approved and adopted by the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs and arguments of the parties, the Appeals Board finds as follows:

The Award of the Administrative Law Judge assessing none of the liability for the claim against the Fund should be affirmed.

Under certain circumstances, an employer can be relieved of liability for a work-related injury to its employee. K.S.A. 1991 Supp. 44-567 reads in relevant part:

> "(a) An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:
>
> "(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund.

"(2) Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers' compensation fund.

"(b) In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto. If the employer, prior to the occurrence of a subsequent injury to a handicapped employee, files with the director a notice of the employment or retention of such employee, together with a description of the handicap claimed, such notice and description of handicap shall create a presumption that the employer had knowledge of the preexisting impairment. If the employer files a written notice of an employee's preexisting impairment with the director in a form approved by the director therefor, such notice establishes the existence of a reservation in the mind of the employer when deciding whether to hire or retain the employee.

"(c) Knowledge of the employee's preexisting impairment or handicap at the time the employer employs or retains the employee in employment shall be presumed conclusively if the employee, in connection with an application for employment or an employment medical examination or otherwise in connection with obtaining or retaining employment with the employer, knowingly: (1) Misrepresents that such employee does not have such an impairment or handicap; (2) misrepresents that such employee has not had any previous accidents; (3) misrepresents that such employee has not previously been disabled or compensated in damages or otherwise because of any prior accident, injury or disease; (4) misrepresents that such employee has not had any employment terminated or suspended because of any prior accident, injury or disease; (5) misrepresents that such employee does not have any mental, emotional or physical impairment, disability, condition, disease or infirmity; or (6) misrepresents or conceals any facts or information which are reasonably related tot he employee's claim for compensation."

K.S.A. 1991 Supp. 44-566(b) defines a "handicapped employee" as follows:

> "(b) 'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:
>
> . . .
>
> "15. Loss of or partial loss of the use of any member of the body;
>
> "16. Any physical deformity or abnormality;
>
> "17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

The Fund correctly states that its liability is premised upon the employer's knowingly hiring or retaining a worker who is handicapped as defined in K.S.A. 1991 Supp. 44-566(b). The question is how specific must an employer's knowledge be to meet the requirements of K.S.A. 1991 Supp. 44-567. The question of whether an employer has sufficient knowledge of an employee's preexisting impairment to qualify under K.S.A. 1991 Supp. 44-567 is a question of fact.

In Denton v. Sunflower Electric Coop, 12 Kan. App. 2d 262, 740 P.2d 98 (1987), *Aff'd* 242 Kan. 430, 748 P.2d 420 (1988), the court was presented with this issue of whether the evidence was sufficient to establish that respondent retained claimant after having acquired knowledge of a preexisting impairment of such character that he was a handicapped employee within the meaning of the statute. The court noted the statutory requirement that only where it is proven that an employee was hired or retained by the employer with knowledge of a handicap will liability for compensation be shifted from the employer to the Fund. It is the employer's burden to prove that claimant was hired or retained after the employer acquired knowledge or knew of an impairment causing the employee to be handicapped.

In Denton, the Court determined that claimant's preexisting disk disease put him at a disadvantage in obtaining employment or reemployment. It was not necessary that the employer have a "mental reservation" when hiring or retaining the handicapped employee. To relieve the employer of liability, it was sufficient that it show that the employee was handicapped and that the employer knew of the impairment. See also Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 701 P.2d 336 (1985).

The Fund disputes that respondent knew claimant had episodes of back soreness, and further asserts there was no evidence that respondent knew claimant was impaired

or handicapped. The Fund argues that even if respondent had knowledge of claimant's prior back injury or injuries that such knowledge did not rise to the level of knowledge of a handicap.

The determination of whether an employer's knowledge was sufficient to constitute a knowledge of a handicap is made on a case-by-case basis. It is not necessary that the employer's knowledge be of a particular and medically specific injury "the requisite knowledge is knowledge of handicap causing functional limitation," Denton, 12 Kan. App. 2d 268. Under the facts of this case, the Appeals Board finds the employer's knowledge did not rise to the requisite level.

Claimant was a 30-year-old man who had worked for respondent about four years as a screw polisher. He was injured on or about May 22, 1992, when he was working on Bradbury rolls weighing from 25 to 50 pounds. At the time claimant was hired by respondent, claimant was not experiencing any problems with his back. In 1990 he did tell respondent that he had received restrictions for his back but he was nevertheless placed in work activities that violated those restrictions. At the regular hearing, claimant said he downplayed his condition prior to the accident, which is the subject of this claim, because he knew respondent was ready to get rid of him and he needed the job.

Claimant's medical history includes two previous back injuries. In 1979 or 1980 claimant was injured in a football game. He was sent to a physician but did not receive medical treatment for that injury. His symptoms resolved on their own and thereafter he was able to work without any restrictions or accommodations. He experienced an injury at home on December 8, 1990, when he coughed. He received medical treatment and was released with restrictions by Dr. Manguoglu of no lifting over 25 pounds frequently and 50 pounds occasionally. Nevertheless, he was returned to his same job. The restrictions were not followed while working for respondent prior to his injury. Claimant's supervisor, Jim Gasper, testified that he was aware claimant had some prior back problems. Mr. Gasper denied, as claimant testified, that when claimant would occasionally mention he was having a problem doing a particular job, he would make claimant do the job anyway. However, claimant did perform the regular duties of a screw polisher and would even work with Bradbury rolls, which could weigh up to 100 pounds. Mr. Koehn, plant manager, testified he thought they would have had someone help claimant with heavy lifting activities. Both Mr. Gasper and Mr. Koehn testified they did not consider claimant to be a handicapped employee. There was nothing in claimant's personnel file indicating any limitations or restrictions on claimant. Respondent did not file a Form 88, Notice of Handicap, with the Division of Workers Compensation.

The respondent has not carried its burden of proof in this case. Although claimant had prior injuries and restrictions, the record does not establish that respondent had knowledge of a handicap.

The Kansas Court of Appeals stated in Hines v. Taco Tico, 9 Kan. App. 2d 633, 683 P.2d 1295 (1984):

> "While some Kansas cases have held that knowledge of a general back problem is the equivalent of knowledge of a handicap, a single back injury does not necessarily affect one's work ability or employment possibilities and cannot be assumed to have recurring effects. . . . In those cases where knowledge of a back problem has been found to be knowledge of a handicap, the employer appears to have known that a particular back injury had affected or was likely to affect the employee's work."

The record in this case does not convince the Appeals Board that respondent knew that claimant's back condition "had affected or was likely to affect the employee's work". The evidence does not establish that respondent knew claimant was experiencing any difficulty performing his job with respondent. Furthermore, respondent did not appear to know or care that claimant had restrictions for his back. Therefore, even if the claimant was handicapped, the respondent did not know it. As counsel for the Fund points out, respondent had knowledge that this worker had some episodes of back problems but claimant was, nevertheless, treated just like any other employee. The evidence is not sufficient to carry the respondent's burden of proof with regard to knowledge of handicap.

For the reasons stated and based upon the record as a whole, the Appeals Board finds that respondent has failed to carry its burden of proof with regard to claimant's handicapped status and with regard to the knowledge requirement. As such, the Award of the Administrative Law Judge assessing no liability against the Fund should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated January 10, 1995, should be, and hereby is, affirmed as to the order assessing no liability against the Kansas Workers Compensation Fund. All other findings, conclusions and orders of the Administrative Law Judge and the Special Administrative Law Judge are also hereby approved and adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David G. Shriver, McPherson, KS
Jeffrey E. King, Salina, KS
Norman R. Kelly, Salina, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director